

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1330

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

77-1330

UNITED STATES OF AMERICA,
APPELLEE,

-v-

ALFRED LEWIS,
DEFENDANT-APPELLANT.

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P/S

DOCKET NUMBER 77-1330

APPELLANT'S BRIEF

Appellant, Pro Se

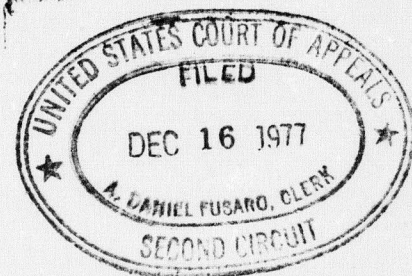


TABLE OF CONTENTS

	PAGE
<u>Citations</u>	IV-V
Cases	IV-V
Constitution	V
Statutes	V
Miscellaneous	V
 <u>Issues Presented For Review</u>	 1-2
<u>Statement of the Case</u>	3
<u>Statement of Facts</u>	4-25
The Crime	4-5
The Arrest of the Defendant	5-7
Testimony of Arresting Officer Walter Cowles	5-7
Testimony of Police Officers Baumer and Labrese	6-8
Testimony of Asst. Bank Manager Susan Brewer	8-10
Testimony of Bank Teller Daniel Gonzalez	10-11
Testimony of Tipster Reinaldo Carnival	11-12
Testimony of Police Officer John Ramsey	12-13
Testimony of Police Sgt. Jay Kosack	13-14
Testimony of F.B.I. Agent Joseph Conway	14-15
Testimony of the Defendant	15-17
Testimony of F.B.I. Agent John Hippard	18-19
Refusal of Court to Admit Police Radio Tapes	19-20
Refusal of Court to Hold Government to proof in accordance with the Statements Contained in its Discovery Revelations	20-22
Objection to Court's Instruction to the Jury on the Question of Flight	22

TABLE OF CONTENTS(cont.)

	Page
Pretrial motion to suppress evidence on grounds of illegal arrest and illegal identification confrontation	22-23
Pretrial motion for substitution of prosecutor	23-24
Post-trial motion to vacate conviction for ineffective representation by counsel	24-25
<u>ARGUMENT</u>	25-61
Point 1.--The defendant was illegally seized, illegally searched and illegally arrested and evidence secured as a result was used to convict him thus violating his rights under the Fourth Amendment of the United States Constitution.	25-34
Point 2.--There was a warrantless search of the suitcase taken from the defendant after it had been taken to the police station which violated the defendant's rights under the Fourth Amendment of the United States Constitution. <u>United States v. Chadwick</u> , ___ U.S. ___ (June 21, 1977).	34-35
Point 3.--The defendant's constitutional rights of due process of law were violated by the admission of testimony and outgrowth of an illegal pretrial identification confrontation.	36-43
Point 4.--The defendant's constitutional rights to due process of law were violated when the Court refused to admit police radio conversation tapes which would have proved a pattern of police lying at the trial among other things.	43-46
Point 5.--The defendant's constitutional rights of due process of law were violated by (a) the failure of the government to be held to proving that certain evidence used against the defendant was found where stated in its pretrial discovery document given to the defense instead of being allowed to introduce on trial the surprise testimony of police officers that this evidence was found elsewhere; and(b) the refusal of the Court to admit for the defense the pretrial discovery document given to the defense by the government in which the government stated that certain evidence was found in another place than on the defendant's person when its police witnesses testified on the trial that the evidence in question was found on the defendant's person.	46-49
Point 6.--The defendant's constitutional rights to due process of law were violated when the Court improperly charged	

TABLE OF CONTENTS(cont)

the jury that there was evidence of flight by the defendant which it could consider against the defendant without making it clear that it was for it, the jury, to decide if the evidence indicated that it was the defendant who fled from the bank and without describing the acts alleged to have been done by the defendant that constituted that flight.	49-51
Point 7.--The defendant's constitutional right under Sixth Amendment to effective representation by counsel was denied by the ineffective representation by his court-appointed attorney.	51-54
Point 8.--The Court abused its discretion in refusing to order the substitution of the prosecutor upon the defendant's motion made far in advance of trial with the result that the defendant was denied a fair trial in a trial marked by prosecutorial misconduct.	53-59
Point 9.--(a) The Court intervened prejudicially to the defendant in counsel's cross-examination of police officer Calabrese and placed its own incorrect interpretation on an admission favorable to the defense made by the witness, which intervention broke the rhythm and effectiveness of counsel's cross-examination, assisted the witness to retreat from the admission and reverse himself and thus enabled the witness to regain his composure and fortify himself to continue to lie if in fact that is what he was doing and the admission favorable to the defense was but a letdown of his guard, and in this way the defendant was denied a fair trial.	59-61
(b) The Court failed to hold an inquiry to attempt to determine if the defendant's contention that the prosecutor was giving signals to the witness was true or not and thus denied the defendant a fair trial.	59-60, 61
<u>APPENDIX</u>	62-75
Index to Record on Appeal and docket entries	63-68
Copy of discovery document provided defense by government	69-71
Opinion of Court accompanying denial of motion to vacate for ineffective counsel	72-74
Copy of New York Criminal Procedure Law § 140.50	75

CITATIONS

CASES

PAGE

* <u>Adams v. Williams</u> , 407 U.S. 143	26,27,28,29,30,31,32,33
<u>Austin v. United States</u> , 414 F. 2d 1155	50
<u>Brathwaite v. Manson</u> , 527 F.2d 363	51
<u>Brinegar v. United States</u> , 388 U.S. 160	26
<u>Carroll v. United States</u> , 267 U.S. 132.....	26
<u>Gonzalez v. Zelker</u> , 447 F. 2d 797	39
<u>Manson v. Brathwaite</u> , ___ U.S. ___ (June 16, 1977) .40	
<u>Powell v. Alabama</u> , 287 U.S. 45	54
* <u>Sibron v. New York</u> , 392 U.S. 41	31,32
<u>Simmons v. United States</u> , 390 U.S. 377	41,42
<u>State v. Tune</u> , 98 A. 2d 881(12 N.J. 203)	47
<u>Stovall v. Denno</u> , 388 U.S. 293	39
* <u>Terry v. Ohio</u> , 392 U.S. 1	26,32
* <u>United States v. Brignoni-Ponce</u> , 422 U.S. 873 ...	26,32
<u>United States v. Burris</u> , 418 F.2d 677	44
* <u>United States v. Chadwick</u> , ___ U.S. ___ (Jun.21,1977)..	34,35
<u>United States v. Graham</u> , 391 F.2d 439	44
<u>United States v. Halperin</u> , 441 F. 2d 612	43
<u>United States v. Karnap</u> , 477 F. 2d 390	49
<u>United States V. Mejias</u> , 552 F. 2d 435	26,45
<u>United States v. Reid</u> , 517 F.2d 953	40
<u>United States v. Rivera</u> , 321 F. 2d 704	33

* Principal Cases

CITATIONS(cont.)

CASES

PAGE

<u>United States v. Smith</u> , 521 F. 2d 957	43
<u>United States v. Vereen</u> , 429 F. 2d 713.....	51
<u>United States v. Wade</u> , 388 U.S. 218	42
<u>Wheatley v. Warden</u> , 401 U.S. 560	33
<u>Wong Sun v. United States</u> , 371 U.S. 471	34

UNITED STATES CONSTITUTION

<u>Amendment IV</u>	1, 25, 27, 30, 32, 33, 34
<u>Amendment VI</u>	2, 51

STATUTES

<u>Criminal Procedure Law</u> of New York § 140.50.....	26, 32
<u>Fed. Rules of Evidence</u> , Rule 803	44-45
<u>Penal Law</u> of New York § 265.20.....	28
<u>United States Code</u> , Title 28 U.S.C. § 1732	43, 49
<u>United States Code</u> , Title 28 U.S.C. § 1733	49

MISCELLANEOUS

<u>Code of Professional Responsibility</u> (American Bar Association) EC 7-26	54
<u>Williams & Hammelmann Identification Parades</u> , Part I (1963) Criminal Law Review 479, 484	42

ISSUES PRESENTED FOR REVIEW

1. Whether an informant's tip to a police officer that the appellant had a gun was sufficient in itself to enable that police officer to stop the appellant and search him therefor, and upon finding it arrest the appellant without first determining if it was lawfully possessed, when the Supreme Court has stated in effect that such a tip in itself is not sufficient to either stop, frisk or arrest upon the discovery thereof even if the stop and frisk were somehow justified.
2. Whether the ~~warrantless~~ remote-from-place-of-arrest evidence-producing search of a suitcase taken from the appellant upon his arrest constituted a violation of the defendant's Fourth Amendment rights in view of the ~~new~~ Supreme Court decision stating such to be the case.
3. Whether the inability or failure of a crime witness to give a description of the perpetrator immediately after the crime to law enforcement people on the scene actively seeking such description should be the primary consideration in determining whether the witness' subsequent identification of a suspect as the perpetrator in a suggestive showup was the result of the suggestiveness of that showup.
4. whether the defendant's right to a fair trial was violated when the Court refused to admit, under the business entry statute and as part of the res gestae, police radio conversation tapes which would have proved a pattern of police lying at the trial among other things.
5. Whether the defendant's right to a fair trial was violated by (a) the failure of the government to be held to proving that certain evidence used against the defendant was found where stated in its pretrial

discovery document given to the defense instead of being allowed to introduce on trial the surprise testimony of police officers that this evidence was found elsewhere; and (b) the refusal of the Court to admit for the defense the pretrial discovery document given to the defense by the government in which the government stated that certain evidence was found in another place than on the defendant's person when its police witnesses testified on the trial that the evidence in question was found on the defendant's person.

6. Whether the defendant's constitutional rights of due process of law were violated when the Court improperly charged the jury that there was evidence of flight by the defendant which it could consider against the defendant without making it clear that it was for it, the jury, to decide if the evidence indicated that it was the defendant who fled from the bank and without describing the acts alleged to have been done by the defendant that constituted that flight.
7. Whether the defendant's constitutional right under the Sixth Amendment to effective representation by counsel was denied by his court-appointed attorney's failure to, among other things, call a witness clearly favorable to the defense when instructed by his client to do so, and his introduction of evidence clearly against the defendant's interest.
8. Whether the court abused its discretion in refusing to order the substitution of the prosecutor upon the defendant's motion made far in advance of trial with the result that the defendant was denied a fair trial in a trial marked by prosecutorial misconduct.
9. Whether the defendant's right to a fair trial was violated when the Court (a) intervened prejudicially to the defendant in counsel's cross-examination of Police Officer Calabrese and placed its own

incorrect interpretation on an admission favorable to the defense made by the witness, which intervention broke the rhythm and effectiveness of counsel's cross-examination, assisted the witness to retreat from the admission and reverse and reverse himself and thus enabled the witness to regain his composure and fortify himself to continue to lie if in fact that is what he was doing and the admission favorable to the defense was but a letdown of his guard; and (b) failed to hold an inquiry to attempt to determine if the defendant's contention that the prosecutor was giving signals to the witness was true or not.

STATEMENT OF THE CASE

This is a pro se appeal pursuant to an order of this Court dated September 30, 1977, Kaufman, J., upon the original record and a typewritten original with three copies of the appellant's brief pursuant to Rules 24(c) and 31(b) of the Federal Rules of Appellate Procedure and local rule 30(2), from a judgment of conviction under the bank robbery statute (18 USC 2113, subds. (a) and (d)) rendered in the United States District Court, Southern District of New York on May 18, 1977, Metzner, J., after a jury trial, upon which the defendant was sentenced to two concurrent 15-year terms of imprisonment. Notice of appeal from each and every part of that judgment was filed on May 20th, 1977.

STATEMENT OF FACTS

The main facts regarding the crime itself and the defendant's arrest are undisputed. Evidence admitted at the trial of the defendant herein indicated that on January 27, 1977 at about 9:45 a.m., a man entered the Chemical Bank at 59th Street and Madison Avenue in the Borough of Manhattan in New York City (T., 25,26)*; that he displayed a gun, jumped over the counter and forced several tellers to put money in paper bags he brought with him. (T.26,40-41,65); that he jumped back over the counter and left the bank with a substantial amount of the bank's money, (T. 41, 67,76-77); that when he left the bank two of the bank tellers Daniel Gonzalez and James Rodriguez followed him up Madison Avenue to 60th Street where they saw the robber enter a dark colored late model car, drive west on 60th Street, turn south at Fifth Avenue, and, running after the car, saw it turn west again at Central Park South (59th Street) where they lost sight of it after seeing it strike another vehicle (T.68-71); that the robber wore a green khaki jacket, a green cap and a mask (T.40,49-50,67-68,82).

* Hereinafter "T" shall indicate the trial minutes transcripts, "HA" shall indicate the transcript of that part of the pre-trial suppression hearing held on April 4, 1977, to determine the legality of the defendant's arrest and "HB" the part thereof held on April 14, 1977.

Among those in the bank when the robbery occurred were assistant bank manager Susan Brewer (T.26) and tellers Barbara Santoro , Deida Nix (T.40-41), James Rodriguez (T.41) Joyce Shivers , one Marilyn (T.45) and Daniel Gonzales (T.65) . Only two of these Susan Brewer and Daniel Gonzales testified at the trial of the case .

The defendant was arrested on the said January 27, 1977 on 85th Street and Amsterdam Avenue (HA.14-17; T.120-122) . He was the sole passenger in a taxicab and was riding in the rear seat thereof when , as the taxicab approached 85th Street from the south on Amsterdam Avenue it met and stopped for a police roadblock that had been established at the said street and avenue upon radio initiation of New York City Police Officer Walter Cowles of the 20th Precinct because a passenger in another taxicab that had followed the defendant's taxicab from approximately 61st Street near Central Park West told Officer Cowles , who was driving an unmarked police car that his taxicab had stopped alongside of near 73rd Street and Amsterdam Avenue, that the passenger in the taxicab ahead, meaning the defendant's taxicab, was armed with a gun and had just struck his personal automobile (with another car) (HA., Cowles 9-14; T, Cowles 119, 137) *.

*His name is Reinaldo Carnival and his testimony will be discussed further on in this factual statement . That testimony regarding the gun is , however , that he never actually saw a gun in the defendant's possession .

After the defendant's taxicab had stopped for the roadblock Officer Cowles, who had followed the defendant's taxicab from 73rd Street, left his auto and approached the defendant's taxicab with his gun drawn and ordered the defendant to remove his hand from his pocket and then to get out of the taxicab, raise his hands and place them on the taxicab, all of which orders the defendant complied with (HA., Cowles, 13-15). Officer Cowles then asked the defendant if he had a gun, and the defendant indicated yes with a nod of his head (HA. Cowles, 16). Officer testified that he then reached into the defendant's pocket, removed a loaded and cocked Colt 45 automatic and placed the defendant under arrest (HA, 16-17; T. 122). At the subsequent trial he identified Government's Exhibit 10 as the gun in question and on that basis it was admitted in evidence (T. 123-125). Officer Cowles did not remember (HA, Cowles, 32) or did not know (T. Cowles, 138) if the gun's safety device was on or off at the defendant arrest. After he found the gun Cowles patted the outside of the defendant's clothing but did not search him further. (HA., Cowles, 16). A suitcase was then removed from the rear seat of the taxicab in which the defendant was riding by another police officer who was present (Officer Ramsey) and later, at the police precinct station house, found to contain paper bags containing the proceeds of the bank robbery (HA., Cowles 16-17, 18; T, Cowles, 122, 127). The defendant was wearing a black raincoat, black cap and eyeglasses (HA., Cowles 28; T. Cowles, 122). The defendant was turned over by Officer Cowles to two other police officers of the 20th Precinct Officers Baumer and Calabrese, who placed the defendant in their patrol car and drove him to the 20th Precinct station (T., Cowles 122; Baumer 141-142). These two policemen testified at the trial

that prior to taking the defendant to the station , Officer Baumer discovered what appeared to be part of a ski mask around the defendant's neck and removed it (T. ,Baumer I42,I54 ; Calabres I59). Police Officers Baumer and Calabrese identified Government's Exhibit I4 (placed in evidence at T, 20I) as the part of a ski mask that they said Officer Baumer removed from the defendant's neck (T. Baumer I42-I43 ; Calabrese I59). Officer Cowles testified at the trial that although he had his radio on , all he heard regarding the bank robbery was that a Chemical Bank somewhere in the I9th Precinct was held up and that a person fled in a black or brown Ford (T. I34-I35) . The pursuing taxicab , its driver and the passenger who had alerted Officer Cowles near 73rd Street followed Officer Cowles' car to the scene of the arrest (HB., Carnival 30-3I) and were there when the arrest was made , but neither Officer Cowles nor any of the other officers spoke to them prior to making the arrest according to the record (T., Carnival , 97-98) . Upon his arrival at the 20th Precinct station the defendant was placed alone in a holding cell , stripped of all his clothing and each piece of clothing searched (T. Baumer I43-I44 ; Calabrese , I60; Lewis 264). Among other things that police witnesses to the search said they could not recall , the defendant was wearing an overcoat or raincoat , eyeglasses , long underwear , pants and dark shoes (T. Baumer , I44-I53 ; Calabrese I60-I65). The above things , except for the testimony of Officer Cowles that he found the gun in the defendant's coat pocket , and Officers Baumer's and Calabrese's testimony that a mask was taken from around the defendant's neck , constitute most of the undisputed facts regarding the actual arrest of the defendant .

Both Officers Baumer and Calabrese testified they heard, beginning at 10:00 a.m., police radio transmissions regarding the bank robbery and chase over the 4th Division radio frequency* that they were tuned to (T.Baumer, 149-151; Calabrese, 161-162). they variously testified that they did not get or could not remember getting any description of the bank robber over their radio (T.Baumer, 150-151; Calabrese, 162-163) although Calabrese on cross-examination at one point admitted he heard a description of the robber as white male come over the radio, but the Court immediately, gratuitously and inappropriately injected its own interpretation of the witness' answer breaking the rhythm of counsel's cross and causing the witness to change his answer to "I don't remember any description" (T.Calabrese, 162-163).

The defendant was not identified in court as the bank robber, but one witness, Assistant Branch Manager Miss Susan Brewer, testified that she was brought in to look at the defendant in the holding cell in the police station and identified the defendant's pants and shoes as the same as the perpetrator's (T., 56, 63)**, who, she said, wore among other things dark knit-type trousers with little white specs in them and rubber soled shoes (T., 40),

* The 4th Division radio frequency services several police precincts including theirs, the 20th Precinct, and also the 19th Precinct (T., Baumer, 152) which is the precinct in which the Chemical Bank in question is located (T., Cowles, 134-135).

** Astonishingly this identification of the defendant's pants and shoes as the same as the robber's was put before the jury for the first time by the defendant's own counsel on cross (T. 56).

and had yellow skin and short curly hair which she said she saw on the back of the robber's neck when he bent his head and the cap he was wearing moved giving her a view of the hair and skin color on his neck (T.41-42). She testified that police told her before the confrontation that the defendant had been captured with the bank money and a gun (T.35,54). She also testified in effect that she never gave any description of the robber to law enforcement people who were at the bank following the robbery (T.37-38,54,56) because she could not remember if anyone asked her (T.51). She had previously testified however that she was questioned in the bank by the police about the crime after the robber left and the police arrived (T.30) which she said was about two or three minutes after the robber left (T. 51) and that she had been concentrating during the robbery on something to identify the robber (T. 41). Susan Brewer also testified that she saw the gun and "those two knit things, the hat in the police station" (T. 55) which was obviously a reference to the hat and mask used by the robber which were Government's Exhibits 14 and 15 . She testified it was at least an hour, maybe two or three, after seeing the defendant in the holding cell before she was asked by officers to give a description of the perpetrator (T.37). When she was confronted with the written statement of her description of the perpetrator's clothing (Defendant's Exhibit A then put in evidence) which recorded her as saying the pants of the perpetrator were plaid which was at variance with her trial description of them, she stated she did not remember telling anyone the pants were plaid because she did not remember them as such (T. 62). She testified she had reviewed with the prosecutor her prior description of the perpetrator in a meeting with the prosecutor held that very day of her testimony, (T.55-56).

Susan Brewer stated at various times in her testimony that she could not remember whether she described the defendant to the police after the robbery when the police arrived (T. 30,31) . She testified she could not remember rightly what the police told her when she went to make the identification in the police station (T. 33-34) ; that she could not remember if the defendant in the cell at the identification confrontation had on a hat or not (T. 36) . She apparently forgot about her earlier testimony (T. 30) that when the police came into the bank after the robber was gone they went into the tellers' area and asked about the robbery and even talked to her there , and later stated (T. 51) that the police did not interview anyone in the bank for as long as she was there . Susan Brewer also testified that when she left the bank for the police station and the identification confrontation she thought she was going there only for the purpose of making a statement (T. 53-54) .

With Susan Brewer at the police station confrontation for the identification of the defendant was Daniel Gonzalez , one of the two bank tellers who followed the robber for some distance from the bank during his flight after the robbery , who accompanied Miss Brewer to the police station after the bank manager received a call that the police had just made an arrest and wanted them to identify the person (T. Gonzalez , 83) . He testified that Susan Brewer was there when the word came that they were going to the police station to make an identification (T. 83-84) . Gonzalez testified that the robber wore army - type , army-color khaki pants (T. 68) and that he was surprised when he went to the police station and saw the defendant - suspect was not white (T. 79) . Gonzalez testified further that the police and F.B.I. were trying to get a description of the robber at the

at the bank following the robbery and that he did not hear anyone give a description (T. 82-83) . Gonzalez , at the police station confrontation did not identify the defendant as the robber or any of the defendant's clothing as that worn by the robber .

Reinaldo Carnival testified that on January 27 , 1977 at some time after 9:00 a.m. , he was driving his car on 59th street (Central Park South) near fifth Avenue , going in the direction of Columbus Circle (West), when another car , a black car , struck his automobile and did not stop (HB, 2-3; T. 88-89); that he lost sight of the car and stopped momentarily to look at the damage to his car (HB, 3; T. 89); that another motorist nearby indicated to Carnival that he saw the fleeing vehicle and that Carnival should follow him and that he apparently would point it out to Carnival (HB. 3-4; T. 89); that he followed the motorist and after some distance he again saw the black car moving slow and parking a little before or a little after Seventh Avenue (HB. 15, 26-27; T. 90, 103-104); that he, Carnival , guided his car to a space in front of the black car and left his car to approach the driver thereof who at this time emerged from the car on the drivers side , walked around to the other side and got a blue suitcase from the back seat , then closed the door and started walking west on 59th Street (HB. 4-5, 16-17 ;T. 90-91); that the man , whom he identified at the trial as the defendant (T. 98), was wearing a black leather hat and a black three-quarter length coat (HB. 6) and eyeglasses (T. 92); that he accosted the man and attempted to talk to him about the accident , but the man put his hand inside his coat and told him to leave if he did not want to get killed , whereupon he , Carnival , stopped but continued to follow the man (HB. 5,19; T. 93); that the man thereafter entered a taxicab but left it and afterward had a confrontation with the taxicab driver

who tried to stop the man after Carnival approached the cab driver and told him not to take the man because he, Carnival believed him to be a burglar because he was leaving the scene of the traffic accident (HB. 6-8; T. 93-95); that the man eventually entered another taxicab which drove off with Carnival and the previously-referred-to taxicab driver following in the previously-referred-to taxicab (HB. 8-9; T. 95-96); that as they continued following the taxicab in which the defendant was riding they found themselves alongside of the unmarked police car referred to previously in this factual statement containing Police Officer Walter Cowles who brought about the arrest of the defendant at the road blockade at 85th St. and Amsterdam Ave. ; that he , Carnival , told Officer Cowles that the man in the cab up ahead ---- meaning the cab in which the defendant was riding --- had a gun whereupon Officer Cowles took up pursuit of the cab with Carnival and the taxicab driver following (HB. 9-10; T. 96-97). At no time did Carnival testify that he saw a gun prior to the defendant's arrest; in fact , his testimony indicates he never saw a gun and only thought the defendant had a gun (HB. 19-29; T. 94).

Police Officer John Ramsey of the 20th Precinct testified in pertinent part that he was on radio motor patrol with a partner on January 27, 1977 at about 10:00 a.m. , and that at that time he came from 85th St. and Central Park West to 85th St. and Amsterdam Ave. and got there at approximately 10:00 a.m. (T. 169-171); that on arrival at 85th St. and Amsterdam Ave. he saw one other sector car containing Officers Baumer and Calabrese, a taxicab and Officer Cowles standing outside the taxicab with thw defendant (T. 171); that he searched the taxicab outside of which the defendant and Officer Cowles were standing , found a large suitcase which he took and put in his car and returned with it to the 20th Precinct (T. 172); that when he arrived at the 20th Precinct sometime between 9:30 and

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10:00 a.m. or sometime thereafter (T., 174-175), he placed the suitcase on the table, opened it and found it to contain two paper bags containing a lot of money (T. 172-173). He identified Government Exhibit 7 (put in evidence at T., 199-200) as the suitcase in question (T. 173). Officer Ramsey testified further that he was on patrol all morning in his radio car with his radio tuned to the 4th Division radio band and listening thereto (T. 175); that he had been assisting in the effort to capture the bank robber who he heard over his radio was being chased through Central Park (T., 176); that he received a radioed description of the robbery vehicle but did not recall hearing any description of the perpetrator broadcast (T. 177).

Police Sergeant Jay Kosack of the 20th Precinct testified in pertinent part that he was on motor patrol in a radio car from 8:00 a.m. to 4:00 p.m. on January 27, 1977 (T. 180, 187); that at approximately between 10:00 a.m. and 10:30 a.m. he was examining the automobile used in the bank robbery after having been instructed by radio to go to the location thereof apparently to safeguard or take possession of it (T. 181, 193); that the car was at the north curb of Central Park South (59th Street) between Seventh and Eighth Avenues (T., 181, 186); that he found lying in the street about a foot from the car a dark green knit-type hat with holes in it and paper towels in it which he identified as Government Exhibit 15 (put in evidence at T. 202) (T., 182-183); that he did not discover a ski mask, only a ski hat (T. 193); that he told agent (FBI) that he had recovered a ski mask on the street (T. 194). Sergeant Kosack further testified that he also had a portable radio enabling him to hear radio transmissions when not in the car (T. 190-191); that he only heard 4th Division radio transmissions (T. 187, 191); that, with regard to the bank robbery, he only heard a description of the car and that it

was being pursued in Central Park and lost in the vicinity of Central Park , and that he did not know if there was any description given of the occupant because he could not remember (T. 192-193) .

F.B.I. Agent Joseph Conway testified in pertinent part that he was on duty on January 27, 1977 and participated in the investigation of the bank robbery in question and that he arrived at the 20th Precinct about 10 :30 a.m. (T. 196) ; that he saw the defendant there alone in a holding cell lying on the floor , and that in the holding cell with him was a green waist jacket — Government's Exhibit I7 previously identified by Assistant Bank Manager Susan Brewer as just the kind worn by the bank robber (T.,Brewer 49) — (T. , 204) . Agent Conway then identified Government Exhibit I7 as the jacket in question and it was then admitted into evidence , over the defense objection that there was no showing of its connection with the defendant , upon the Government's argument that the coat was identified as that which the bank robber wore and although the police officers who took the defendant into custody did not recall specific clothes he wore recall the cell was empty when the defendant was placed in it and thus the coat could only have been the defendant's (T. ,205-207). Agent Conway further testified that the shopping bags used in the robbery (Government's Exhibit 5A and 5B in evidence at T. 199) were cut open in the F.B.I. laboratory in order to check them for fingerprints (T. 200) ; that at least one of the bags bore identifiable fingerprints which were not the fingerprints of the defendant (T. 218). Agent Conway testified further that the F.B.I. office which he worked had a radio scanner which enabled them to pick up police radio transmissions of the 4th Division radio band as well as all other division radio frequencies that are monitored in their office by a bank robbery coordinator and

that their office received all of the police radio transmissions regarding the bank robbery in question (T.,212-213); that when they were notified by their coordinator of the robbery he and at least one other agent jumped into the car which was equipped with a radio receiver and therein received radio transmissions regarding the robbery at least from the FBI bank coordinator (T.,213-214); that he did not know if the car in which he was riding was equipped with a radio scanner to pick up calls directly from the police radios (T.,214) that they received no radio transmissions of either the car used by the robber or the color of the perpetrator, although he received transmissions regarding the chase that was taking place and toward which they were heading, until he arrived at the 20th Precinct at about 10:45 after the defendant was arrested (T.,216-217); that the only description he had prior to that time was that the perpetrator had a weapon, a ski mask and a jacket (T.215)

The defense in the case was that the defendant was framed and deceived by another person into unknowing possession of the bank robbery proceeds under circumstances which made him appear to be the robber for the purpose of minimizing the actual robber's risk in getting the bank robbery proceeds out of the vicinity of the robbery (T.22-24 opening statement) and centered around the defendant's testimony (T.249-299) that he met a man who gave his name as Max in a 42nd Street book store who approached the defendant, because he recognized the clothes the defendant was wearing as prison-release clothing (T.249); that after Max ascertained that the defendant had indeed been recently released from prison he offered the defendant a job as a money courier in a midtown

gambling operation for a payment of \$2000 for each money transfer (T. 249-250); that he gave the defendant a gun for the stated purpose of protecting the money from holdup men the gambling operation was having a problem with(T., 250-251, 252-253); that on the day of the robbery the defendant was unknowingly maneuvered by Max into the automobile used in the bank robbery with instructions to take a suitcase therein , said by Max to contain gambling proceeds, to another part of the city to await further contact(T.,256-259); that this maneuver took place on 59th Street (Central Park South) between Sixth and Seventh Avenues but very close to Sixth Avenue(T., 257); that the defendant was unable to drive the car to the designated other part of the city because the car tire went flat soon after he entered the car, and he therefore had to leave said car with the idea of taking a taxi to the designated location(T.,259-261); that a man (the witness Carnival) approached the defendant after he left the car who he thought might be a holdup man intending to rob him (T., 260-261); that he stuck his hand in his pocket and told this man to leave or he would blow the man's brains out and the man left (apparently) (T., 261); that he ultimately entered a taxicab, following a confrontation with a prior taxicab driver causing him to have to leave the first cab (T., 261-262), giving the driver instructions to take him to 110th Street (T., 263). The defendant had previously testified that he did not want to take a single taxicab directly to the location given him by Max (which was 181st Street and Broadway, T. 257) in case someone was following him(T., 261-262). The defendant testified further that the taxicab proceeded to about 85th Street where it was stopped by a police roadblock (T., 263); that he, the defendant, was ordered out of the car at gun-point by a policeman who searched him and removed the defendant's

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gun from his holster, placed him in handcuffs and turned him over to another policeman who put the defendant in a car and took him to the police station (T 263-264); that in the police station they put him in a cell and made him remove his clothes, which they then searched, and afterwards had him put back on (T.264); that a while thereafter a policeman came over with a green coat which looked like Government Exhibit 17 and ordered the defendant to put it on (T.264-265,275); that he then got the impression that people were looking at him for identification purposes because he saw people looking in the cell at him and could hear their voices saying things like "Yeah that's him" and "Yeah that looks like him" (T.265). The defendant testified further that he never had on the mask, Government Exhibit 14, that police Officers Baumer and Calarese testified that Baumer removed from the defendant's neck when arrested (T.268,273-274). The defendant described Max as white, approximately the height of the defendant if not slightly taller, slim, with blond or brown hair and about 45 or 50 years old (T. 252,293). The defendant stated further that when Max picked him up on the day of the robbery Max was wearing a green coat similar to the one, if not the same one identified as used in the robbery, and a green hat that appeared the same as that identified as used in the robbery (T.258,275); that white paper was sticking out from under Max's green hat in the forehead area (T.294-296); that the last time he saw Max-which was on 59th Street near Sixth Avenue after Max had dropped the defendant off and returned some 15 minutes later to turn the car over to the defendant (T.257-259)-Max was not wearing the green jacket (T.274-275).

V
F.B.I Agent John Hippard, who although called at the instance of the defense was considered a Court witness (T. 305-306) and whose qualifications were accepted by the Court without objection, testified that he was a special agent assigned to the FBI laboratory in Washington, D.C. and that part of his job was to conduct microscopic examination of hairs, fibers and related material (T.306-307); that in connection with this case two items, among others, which he identified as Government Exhibits 14 and 15 in evidence, the ski mask and the hat used by the robber respectively, were submitted to him for examination (T.307-308); that the hat used by the robber had paper in it when he received it (T.312); that he did not receive Government Exhibit 17 (the green jacket worn by the robber) to examine (T. 308); that on Government Exhibit 14 he found one, and on Government Exhibit 15 he found two Black Negroid limb hairs, meaning hair from the arms or legs, not suitable for identification purposes (T.310); that these limb hairs could have come from where the article was sold or from anybody who handled these items or from indirect contact such as being placed where the hairs could have been laying (T.316-317); that he found one light brown caucasian head hair fragment not suitable for identification purposes on Government Exhibit 14 (T.310-311); that it was possible for the Caucasian head hair to have gotten on Government Exhibit 14, by it being pulled over the head as well as by indirect contact (T.311-312,317).*

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The mask was so constructed that in order to put it on it had to be pulled over the head.

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Agent Hippard further testified that if the jacket worn by the robber (Government Exhibit 17) had been submitted to the laboratory it could have been tested for laundry marks (T.312-313).

The Court denied a defense motion to introduce into evidence (T.229-230) under the business entry statute and on the further grounds that they were part the res gestae and that they tended to contradict the statements made by the law enforcement witnesses that they heard some of the things broadcast on the radio regarding the robbery and not the rest, voice tapes of the 4th Division radio band communications that occurred during the search for the bank robber which tapes contained many repetitions of a description of the bank robber as a white male (T.229,231). The stated purpose of the defense for seeking the tapes' entry in evidence was (1) to impeach by demonstrating as incredible and untrue the police testimony that they heard no, or did not remember hearing any description come over their radios regarding the perpetrator or his race (T. 229,302); (2) to support the validity of the defense as outlined in the opening statement of the trial (T. 22-24) that the defendant was deceived by the real robber into possessing to carry away from the crime area the proceeds of the robbery so that the actual robber would not have to run the risk of evading the massive search he knew would follow the robbery, by showing that there was indeed a massive search for the perpetrator right after the robbery, and thus show valid motive for the real robber to deceive the defendant into possessing and carrying away the proceeds of the robbery right after the robbery (T.234-235,241); and (3) to establish a motive that would impel police to fabricate—such as say they found a mask on the defendant neck when actually

✓ they did not-evidence in the belief that they must do this to offset the recorded description of the robber as a white man (T. 233-234).

The Court denied entry of the tapes on the first ground stated by saying that the presence of the description on the tapes did not contradict the testimony of the law enforcement people because "they just said they *didn't* hear it"(the description) (T.229-230); the Court denied entry of the tapes on the second ground with the statement that "this man was arrested by happenstance . He happened to hit Carnival's car and get a flat tire and it was the broadcast from the cab driver that really set it up" (T.235); and the Court denied the entry of the tapes on the third ground with the statement "I am sorry, I *don't* find any motive on the part of the police"(T.233-234). After listening to the Government's objections to the tapes' entry in evidence the Court stated flatly that it did not think the tapes were admissible (T.233).

The Government's contentions against their admission into evidence were that the tapes contained double hearsay in that the information on the tapes was being repeated over the radio after having been given to police officers by another party (T. 231-232); that the information on the tapes was not part of the res gestae because the declarant on radio is not the person witnessing the robbery (T. 232-233); and that, in agreement with the Court, the tapes did not contradict the officers because it is only a matter of what the officers heard (T.233).

The Court denied a defense motion to hold the government to proving that certain evidence used against the defendant was found where stated to the defense both orally and in its pre-trial discovery document dated February 17, 1977 given to the defense with a copy thereof being served upon the Court (T. 145,146).

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The Government represented to the defense both verbally and in its discovery document that the ski mask, Government Exhibit 14, testified at trial by Police Officers Baumer and Calabrese to have been removed from the defendant's neck at the time of his arrest (T., Baumer 142-143; Calabrese, 159) was found in the taxicab in which the defendant was riding (T.145). *

* Annexed hereto at Pages 69-71 of the Appendix is a copy of that discovery document. It was given to the defense in accordance with an agreement reached with defendant's counsel in a Court proceeding held on February 15, 1977 before trial judge Metzner to provide the defense with a list of items of physical evidence in the case and information on where found (Record on Appeal, Dec.No. 7, P.5). Additionally the Government's March 7, 1977 answering affidavit to the defense motion to suppress for illegal arrest also contains a sworn admission by the Government in paragraph 3 thereof to the effect that the mask used by the robber was discovered in the suitcase found in the rear seat of the defendant's taxicab at the time of his arrest (Record on Appeal, Dec. No. 4)

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The Court in denying the defense motion stated simply that it did not think the defendant was prejudiced (T.145) and that "I don't think it makes any difference" (T.146).

The Court denied a defense motion to introduce as evidence the said Government pretrial discovery document as an admission by the Government that the ski mask was found elsewhere than where its witnesses stated at the trial (T. 236-237).

The defendant's counsel objected to the court's instruction to the jury on the question of flight which instruction simply stated in effect that there was evidence of flight by the defendant from the bank which could be considered against him (T. 376-377, 379). Defense counsel's objection was that the instruction on flight should have been accompanied by a further instruction that the question whether it was the defendant who fled from the bank was for them, the jurors, to decide and that it was only contended that it was the defendant who fled and that the court should tell the jury so otherwise the jury may take the instruction as some indication of the defendant's guilt, to which the court answered "I have made it clear in the charge" (T.379).

Prior to the trial the defendant's attorney moved on papers filed March 1, 1977 for an order (1) suppressing all evidence seized from the defendant at the time of his arrest on the grounds that the arrest was warrantless and without probable cause, and (2) suppressing evidence of any identification of the defendant by any witness who viewed the defendant at the police station showup, contended by the

defense to have been suggestive, and any in-court identification by such witnesses (Record on Appeal, Doc. No. 3). On April 4th and 14th, 1977 a hearing was held before trial judge Metzner to determine the legality of the arrest of the defendant and the arrest was ruled legal by the Court on April 14, 1977 and an exception was taken to the Court's ruling (HB 31-3.)*. The Court on April 4th, 1977 deferred until trial the question whether any identification made as a result of the police station showup was illegal(HA.5-9). At trial the Court ruled that the testimony of Susan Brewer, the assistant bank manager, was untainted by the police station showup of the defendant alone in the holding cell (T.26-27,39).

Prior to the trial of the case, on February 15, 1977 the defendant moved the Court (unsuccessfully) to order the replacement of prosecutor T.Barry Kingham with another prosecutor because the defendant had previously experienced a trial with Mr.Kingham as prosecutor and found him to be a dishonest man who engages in evidence suppression and falsification and subornation of court reporters (Minutes of February 15th, 1977, pp.6-8)**

* No written opinion accompanied the Court's ruling.

** Those minutes are contained in the Record on Appeal and are numbered 7.

and additionally because the defendant felt on the basis of information he received—upon arrest from an F.B.I. agent associated with the prior case that Mr. Kingham wanted to personally try this case, which information was further substantiated by two federal prosecutors temporarily associated with the pretrial proceedings in this case—that Mr. Kingham would approach this case in no-holds-barred vendetta fashion, because the defendant had won an acquittal against him in the prior case (Minutes of February 15, 1977, PP. 7-8). The prosecutor, Mr. Kingham, in making an offer to step down from the prosecution and have his office assign another prosecutor if the Court wished, expressed the hope that the Court would continued him on the case (Minutes Of February 15, 1977, Page 10). The

Court, denying the defendant's motion, stated it would not interfere with the administration of the U. S. Attorney's office to tell them that a new prosecutor should be assigned to try this case (Minutes of Feb. 15, 1977, P. 12).

Subsequent to the verdict of conviction but before sentence the defendant made an unsuccessful motion to vacate the verdict of conviction on the grounds that his court appointed counsel was ineffective because of, among other things mentioned in the said motion: *

(a) His failure to have present to testify, *in* spite of being told by the defendant long before trial to do so, an employee of the bank that was robbed who gave counsel prior notice that he could testify that when he was at the police station when the defendant was brought there following his arrest he saw a policeman carrying the coat used in the robbery, when it was attempted by the government to show indirectly through the testimony of several law enforcement officers that the defendant must have been wearing that coat when he was brought into the police station following his arrest although the defendant testified contrarywise.

(b) His failure to call, *in* spite of being told by the defendant to do so, a police department communications expert from the N.Y.C. Police Department headquarters, which is

* That motion is contained in the record on appeal and is numbered 13

located almost accross the Street from the Southern District Court House, to testify regarding a computer printout made there of voice tapes of telephone calls received from civilians and radio calls received from policemen's patrol car radios and handcarried portable radios and which the said expert supplied earlier to counsel, to establish in accordance with the coded times of the occurrences regarding the case contained in the said printout, that the time of the finding of the robber's getaway car coincided in such manner with the arrest of the defendant in another place and that this car therefore, in accordance with the testimony the witness mentioned in paragraph (A) above was ready to give, must have been the source of the said coat instead of the defendant's person which the government urged indirectly on the trial was the coat's source, the said getaway car having been established to be the source of other things directly connected to the robber and the robbery and having been found some eight minutes before, according to the said printout, the defendant was put into the police car and driven to the police station, with the defendant testifying that he never had that coat on and that he was made to put it on in the police station, and the police testifying that no coat was taken from the defendant's person prior to his arrival at the police station and that he therefore must have had it on when he arrived at the police station.

The motion was denied on April 18, 1977 the day of the sentencing of the defendant (T. 393), and an opinion of three pages was filed on May 27, 1977. * That opinion in pertinent part (PP 2-3 thereof) held it was debateable whether it was better to leave the impression that someone planted the jacket in the cell with the defendant as occurred on the trial or to produce the additional testimony which might imply that the jacket was found when the defendant was arrested and brought to the station with him; and, regarding the failure of counsel to call the communications expert, that "Since the court had ruled out the tapes and printout of 911 and radio broadcast communications, there was no need for a police expert to testify how they were made".

ARGUMENT

Point 1

The defendant was illegally seized, illegally searched and illegally arrested and evidence secured as a result was used to convict him thus violating his rights under the Fourth Amendment of the United States Constitution

* That opinion is contained in the Record on Appeal and is numbered 16, and a copy thereof is also contained in the Appendix here of at Pages 72-74

(8)

As pointed out in the Statement Of Facts hereof at pages 22-23, the Court denied after a pretrial evidentiary hearing a motion to suppress evidence resulting from the defendant's arrest contended in the motion to have been illegal, and the relevant undisputed facts regarding that arrest were detailed earlier in the said factual statement at pages 5-7.

Probable cause to arrest or reasonable suspicion to temporarily detain for investigation exists only when the articulable facts and circumstances within the officer's personal knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief, or suspicion in the case of temporary detention short of arrest, that an offense has been or is being committed. United States v. Brignoni-Ponce 422 U.S. 873; Adams v. Williams, 407 U. S. 143; Terry v. Ohio, 392 U.S. 1; Brinegar v. United States, 338 U. S. 160, 175-176 Carroll v. United States, 267 U. S. 132, 162. New York Criminal Procedure Law § 140.50* also limits New York police officers in their ability to temporarily detain persons for investigation to the above standard (See United States v. Mejias, 552 F. 2d 435, 444 (CA2, 1977) holding that state law is a factor in determining the power of state officials to make arrests for state offenses).

* The text of Criminal Procedure Law § 140.50 is set out in the appendix hereof at page 25.

The seizure (or temporary detention for investigation) and subsequent arrest of the defendant in the present case, as described in the Statement of Facts hereof was violative of his Fourth Amendment Rights as enunciated by the Supreme Court in the cases cited above, expecially in one of the most recent of those cases, Adams v. William, 407 U.S. 143 (1972). In that case ths seizure and subsequent arrest were held justified because the subject Williams was in a high crime area in the early morning hours and reported by a known informant to be carrying narcotics and a ~~concealed~~ weapon which weapon was discovered in a weapons search precisely where the informant had stated thus giving credibility to the informant's further allegation^{OF} narcotics possession which, together with the surrounding circumstances, suggested no lawful explanation for the possession of the gun and provided *probable* cause to arrest the subject. Adams v. Williams, supra, 407 U.S. at 147-148. In the present case the defendant was not in a high crime area in the early morning hours and Officer Cowles and the other policemen were acting only on the information from an unknown informant that the defendant had a gun. Officer Cowles had no information that the defendant had broken was breaking or was about to break any laws *; and if the

* As already indicated in the Statement of Facts Officer Cowles testified that the tipster Carnival told him that the defendant had just hit his car,

defendant had a gun he may well have lawful authorization therefor (Adams v. Williams, supra, 148). **

and an automobile accident is not a violation of the law nor can it constitute the suspicious behavior required (Adams v. Williams, supra, Terry v. Ohio, supra) for the initiation of a temporary seizure for investigation. Carnival did not tell officer Cowles that the person who hit his car had not stopped following the accident to give the usual identification, but only that the individual had a gun.

** The defendant might have been in the military service of the State or United States, in some law enforcement branch of the State or United States, or employed fulfilling defense contracts with the government of the United States or an agency thereof, or he might have been otherwise duly licensed to carry a gun. Section 265.20 of the New York Penal Law excepts all of the above from the laws prohibiting possession of guns. Additionally, the defendant might have been a hunter or trap shooter or his gun might have been a completely legal air rifle or air pistol or a toy gun as the tipster never specified the kind.

There was no articulable connection between the Carnival report and the bank robbery. Officer Cowles testified at the trial that he heard over his radio, that he had on at all times, some 20 minutes prior to the time he took up pursuit of the defendant the transmission of a bank robbery in the 19th Precinct in which an undescribed person fled in a dark Ford and that there was a chase going on (T. 132-135); that after that, radio silence was observed at his request (T. 135); that the subsequent roadblock was set up because of his transmission that he was chasing a yellow taxi containing a man with a gun and not in connection with the bank robbery (T. 137). Nor was any connection between the two urged by the Government at the pretrial suppression hearing. Moreover the testimony of Reinaldo Carnival was to the effect that he never saw a gun thus reducing even further the already inadequate ground upon which Officer Cowles seized the defendant. Clearly this proves—even if a reliable tip of possession of a gun without more were sufficient to establish reasonable suspicion of criminal activity—that the information and informant here did not meet the "indicia of reliability" and "credibility" criteria of Adams v. Williams, supra (407 U.S. at 146, 147).

But a tip of gun possession without more is not sufficient to establish reasonable suspicion of Criminal activity (Adams v. Williams, supra, 407 U.S., at 147-148), and the "indicia of reliability" and "credibility" criteria (407 U.S., at 147)

hold that

"***Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized".

Further investigation was required in the case at bar before a forcible stop could be authorized.

"But in some situations — for example when the victim of a street **crime** seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime — the subtleties of the hearsay rule should not thwart an appropriate police response".

None of the above conditions were present here. The informant here — credible or incredible — did not "warn of a specific impending crime", nor did he relate facts to Officer Cowles that would indicate he was "the victim of a street crime".

It is clear that the defendant's seizure on two counts violated the Fourth Amendment.

There was further violation of the defendant's rights in the search of the defendant which uncovered the weapon.

"When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous (emphasis supplied) ... he may conduct a limited protective search

for concealed weapons" Terry v. Ohio, 392 U.S. at 24, see also Adams v. Williams, supra, 407 U.S. at 146.

Officer Cowles did not allege that he felt his or others' lives or welfare were endangered by the defendant, and, again, he was not investigating an allegation of suspicious behavior. Officer Cowles ordered the defendant out of the taxicab and told him to place his hands against the taxicab and the defendant complied without incident. He testified he entered the defendant's pocket after he got an affirmative nod from the defendant to his question then asked of the defendant whether he had a gun. Officer Cowles should have conducted a pat-down of the defendant's outer clothing or questioned the defendant further regarding the gun's location instead of thrusting his hand into the defendant's pocket (Sibron v. New York, infra), perhaps on the hunch that because the defendant's hand was in that pocket a gun would be there. He had no information that a gun would be there as was the case in Adams v. Williams, supra, 148 where the Court made it clear that the entry by Officer Connally into the spot where the tipster told him the weapon was, was *justified only when Williams refused to alight from the vehicle when ordered*. And, further, as indicated before, Officer Cowles had no reason to suspect that the defendant might be dangerous. Again this was no high crime area, the informant did not give Officer Cowles any information indicating a crime was being, had been or was about to be committed, and therefore

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Officer Cowles never feared for his life or safety or such fear would have been "articulated" at the suppression hearing. United States v. Brignoni-Ponce, 422 U.S. at 880; Adams v. Williams, 407 U. S. at 146; Terry v. Ohio, 392 U. S. at 21, 27; Sibron v. New York, 392 U. S. 41. The weapons search thus violated the Constitution.

The arrest for the gun and incident seizure of the money and other evidence was unauthorized under the Constitution's Fourth Amendment. All Officer Cowles had was a gun. It may have been lawfully possessed. He made no inquiry in that regard before the arrest and subsequent seizure of the money and other evidence as is required by New York Criminal Procedure Law § 140.50 (2).^{*} The arrest was moreover not justified under the Adams v. Williams mandate, for there the Court said:

"...in the present case the policeman found Williams in possession of a gun in precisely the place *predicted* by the informant. This tended to corroborate the reliability of the informant's further report of narcotics and, together with the surrounding circumstances, certainly suggested no lawful explanation for possession of the gun..." Adams v. Williams supra, 407 U. S. at 148-149.

* The text of Criminal Procedure Law § 140.50 is set out in the appendix hereof at page 75

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Those surrounding circumstances being the high crime area the early morning hours and the failure of Williams to alight from the vehicle when ordered Adams v. Williams, supra, 147-148. Such is clearly not the case here. At no time prior to or following the seizure of the defendant at the road blockade — assuming for the moment legal justification for such seizure — did the police attempt to get further information from either Carnival or the taxicab driver who were right there during the entire time of the seizure of the defendant — having followed Police Officer Cowles' car to the scene. Thus, if probable cause could have been secured from Carnival or the taxicab driver or someother source it has no effect now; for as stated in Wheatly v. Warden, 401 U.S. 560 (1971):

"Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate *** A contrary rule would, of course, render the requirements of the Fourth Amendment meaningless." 401 U.S. 560, 565 FN8,

And as stated in United States v. Rivera, CANY 1963, 321 F.2d 704, the discovery following an arrest of evidence of crime does not establish probable cause for the arrest.

Wherefore the stop, search and arrest of the defendant should be declared illegal in violation of the Fourth Amendment

and the fruits of the arrest — the gun, ski mask, robbery proceeds, the identification testimony of Miss Brewer and all other things resulting from the arrest be suppressed Wong Sun v. United States, 371 U.S. 471

Point 2

There was a warrantless search of the suitcase taken from the defendant after it had been taken to the police station which further violated the defendant's rights under the Fourth Amendment.

United States v. Chadwick, _____ U.S. _____
(June 21, 1977).

In Chadwick, *supra*, P.13 slip opinion, the Supreme Court held ---

"* * *However, warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest," Preston v. United States, 376 U.S. at 367, or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest."

As pointed out in the factual statement hereof at pages 6, 12-13, a suitcase was taken from the taxicab in which the

defendant was riding at the time of his arrest by Police Officer Ramsey who placed it in his patrol car and took it to the police station, where he arrived between 9:30 and 10:00 a.m. or possibly sometime thereafter, and placed it on the table and opened it. He did this as soon as he arrived at the police station (T. 172), clearly taking no time to secure a search warrant. He found in the suitcase money inside two paper bags which he turned over to Officer Cowles (T. 172-173), which suitcase, paper bags and money were acknowledged by Officer Cowles as having been received by him — he identified the paper bags as Government's Exhibits 5A and 5B and the suitcase as 7 — and in turn given by Officer Cowles to FBI Agent Conway (T. 126-130) who testified to their receipt and identified the paper bags and suitcase as Government's Exhibits 5A, 5B and 7 respectively whereupon they were admitted in evidence (T. 197-200) with a portion of the money — already identified under Government's Exhibit 6A though 6D as the bank's by bank teller Daniel Gonzalez (T., 74) — being subsequently admitted in evidence during the testimony of another FBI Agent, Daniel Shea, who testified he helped count the money in the police station (T. 222-224).

Wherefore the conviction must be overturned on the additional ground that evidence secured in the warrantless search of the suitcase taken from the defendant was used to convict him. United States v. Chadwick, supra.

Point 3

The defendant's constitutional rights of due process of law were violated by the admission of testimony and outgrowth of an illegal pre-trial identification confrontation.

As indicated at 22-23 of the Statement of Facts hereof the trial court denied at trial a defense motion made prior to the trial to suppress the identification testimony growing out of the police station showup claimed by the defense to have been suggestive.

As indicated at page 17 of the said factual statement the defendant testified that following his arrest he was brought to the 20th Precinct police station and placed alone in a holding cell. He further testified uncontradictedly that he was brought the green khaki robbery jacket by a policeman and ordered to put it on, and that soon thereafter the defendant got the impression that people were looking into the cell to identify him. Susan Brewer, the assistant manager of the bank that was robbed testified as described herein in the factual statement to the identification she made of the defendant in the holding cell. Although there is no indication in the transcript that her testimony regarding skin color and hair type, and her identification of the defendant's pants and shoes as the same as the robber's was in any way influenced by the green jacket or even that she

had seen the green jacket there is no doubt that it was in the holding cell.

An examination of Susan Brewer's testimony gives indication that she did not strive to be truthful, on the contrary, she gave every indication of having been trying in a no-holds-barred fashion to help the Government's case. The indications of this are as follows: She testified on voir dire examination by the defendant's counsel that after the robber was gone the police came into the bank and went into the bank teller's area and asked where people were located and what happened, and that they went into the area where the robbery took place and she talked to the police there(T. 30). She was asked if she gave a description of what the robber looked like or was wearing and answered that she didn't remember if she did or not(T. 30-31). Defendant's counsel returned to that subject on cross-examination and Susan Brewer then testified that when the police arrived in the bank after the robber had left they did not interview anyone in the bank for as long as she was there and that she didn't remember that the police asked her or anyone else for a description of the robber (T. 51) apparently to excuse her failure to provide the police with the description she testified she had been concentrating on getting during the robbery so the robber could be identified (T.40). Susan Brewer also testified that when she left the bank for the police station and the identification confrontation she thought she was going there

only for the purpose of making a statement (T.53-54), and when questioned as to whether Daniel Gonzalez, the bank teller who accompanied her from the bank to the police station, told her the reason why she was going to the precinct station she answered that he said it was just to get statements (T. 32). She testified that on the day of her testimony, prior thereto, she had a meeting with the prosecutor with whom she discussed her testimony and whereat she was shown the gun and other exhibits in the case that she identified (T.55-56). Bank teller Daniel Gonzalez testified however, that the police and FBI were trying to get a description of the robber at the bank following the robbery (T.82-83)---which comported with the testimony of Susan Brewer before she changed it as shown above---and that Susan Brewer was present when word came to the bank via a call to the bank manager that the police made an arrest and wanted them to identify the person (T.83).

As indicated in the factual statement Susan Brewer testified that prior to the confrontation she was told by the police that defendant had been captured with the bank's money and a gun (T. 35,54). She testified she saw the gun and "those two knit things, the hat in the police station" (T. 54-55) which was obviously a reference to the hat and mask used by the robber.

As indicated in the factual statement, Susan Brewer's identification of the defendant's pants and shoes as the same as the robber's was put before the jury for the first time by

the defendant's own counsel on cross (T.56), however it was nonetheless prejudicial therefor. However the witness' direct testimony that the robber had yellow skin on his neck and short curly hair is contended to be just as much an outgrowth of the suggestive police station showup and just as prejudicial since these are things that are before the jury's eyes without additional developmental testimony, and the Government used these things to its advantage on cross-examination of the the defendant (T.297) and on summation (T.326-328).

The conditions of the police station confrontation for identification in the case at bar were among the grossest, most suggestive conditions under which confrontation for identification can take place. Stovall v. Denno, 388 U.S. 293, 301-302. And unlike the suggestive identification procedure in U.S. ex rel Gonzalez v. Zelker 477 F. 2d 797 (CA 2, 1973) where the witness gave a good initial description prior to the identification (Gonzalez, supra, 801) and where this Court noted that there was "no indication at all that the police were guilty of any activity designed to unfairly influence the trial of the relator" (Gonzalez, supra, 803), the present case involves the forcing of the robbery jacket upon the defendant as well as telling the witness that the defendant was caught with the gun and money and displaying to the witness such items as the gun taken from the defendant and the mask and hat used by the robber. This, it is submitted, should

operate to automatically exclude the identification testimony of Susan Brewer because these are the conditions if there ever were any that make "unanswerable" the question referred to in United States v. Reid, (517 F. 2d 953,966 [CA 2, 1975]):

"...whether, before the imprint arising from the unlawful identification procedure, there was already such a definite image in the witness' mind that he is able to rely on it at trial without much, if any, assistance from its successor." United States ex rel Phipps v. Follette, 428 F. 2d 912, 915 (2 Cir. 1970). See United States v. Wade, 388 U.S. 218, 241, 875 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)."

But if an answer must be made for the question in the present case pursuant to Manson v. Brathwaite, (___ U.S. ___ [June 16, 1977]) which case does not involve the premeditated activity of the police to influence the defendant's trial (Gonzalez, supra, 803), that answer must be that Susan Brewer did not have "such a definite image" in her mind as to rely thereon without much assistance from the prior unlawful show-up. For if she did the witness would have given that description to law enforcement people who arrived at the scene following the robbery, as she was there when they came (T.30). Though she testified nobody asked her what the robber looked like, everybody knows the first thing law enforcement people do in such a case is to get a description off the perpetrator. That is exactly what the police and FBI who arrived at the scene following the robbery were doing in this case testified

bank teller Daniel Gonzalez (.82-83). Susan Brewer testified she was looking for something to identify the perpetrator during the robbery (T.41). To whom did she intend to identify the robber if not to the police and FBI? In a case of her having such a description of the perpetrator as to provide clues of his skin color, race and clothing details she would have volunteered such helpful information if not asked. The fact in all probability is that upon finding out that the police had captured a suspect with the bank's money and a gun (T.35,54) she "remembered" the robber's pants, shoes, skin color and hair—which latter two things the Government used to its advantage on summation (T. 326-328)—only after seeing the defendant in the holding cell. He therefore had to be the robber to her; thus the clothing that she had the opportunity to observe at relaxed leisure had to be the robber's clothing, and it was then that she deceived herself into thinking she saw them in the bank on the perpetrator.

The following references from the opinion of the Supreme Court in Simmons v. United States, 390 U.S. 377, although concerned with the photographic identification before the Court in that case, apply equally if not in greater degree to live identification confrontation. The Court recognized the danger that a witness seeing a suggestively displayed picture will "retain in his memory the image of the photograph rather than of the person actually seen" (Simmons, supra, 383-384). "Subsequent identification of the accused then shows nothing

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except that the picture was a good likeness". Williams & Hammelmann, Identification Parades Part I (1963) Crim. L. Rev. 479,484 (work cited in United States v. Wade, 388 U.S. 218,229). As Simmons warned, the danger of error is at its greatest when "the police display to the witness only the picture of a single individual...(and) is also heightened if the police indicate to the witness that they have other evidence that...the person () pictured committed the crime" (390 U.S. at 383).

To the above findings of the Supreme Court it should be added that however poor the conditions for viewing the perpetrator at the scene may actually have been (poor light, nervousness, not looking sufficiently long in the perpetrator's direction, etc), once the witness becomes convinced of the identification as the result of a suggestive confrontation those poor viewing conditions must be simultaneously elevated in the witness' mind to good conditions for viewing. Thus the predominant factor for determining whether the witness' identification is reliable must be held to be whether the witness gave a comportsing description prior to the first identification confrontation when there was unquestionable opportunity to do so. Here the witness gave no prior description when there was unquestionable opportunity for her to give one when she was in the presence of police and FBI agents actively seeking such clues.

Wherefore the conviction must be overturned on the additional ground that the defendant's constitutional rights of due process of law were violated by the trial court's ruling resulting in the admission and the admission of testimony of an illegal pretrial identification confrontation, the outgrowth thereof and the identification itself.

Point 4

The defendant's constitutional rights to due process of law were violated when the Court refused to admit police radio conversation tapes which would have proved a pattern of police lying at the trial among other things.

As pointed out in the factual statement hereof at pages 19-20, the trial court repulsed a defense attempt to introduce under the business entry statute (28 U.S.C. § 1732) and as part of the res gestae, and for the reasons stated in the factual statement, voice tapes, regularly made in the course of police business, of the police radio communications during the time of the robbery and its aftermath, which tapes were replete with descriptions of the robber as being of the white race.

Police records are admissible under the business entry statute. United states v. Smith, 521 F. 2d 957 (D.C. Cir. 1975); United States v. Halperin, 441 F. 2d 612, 618 (CA Tex. 1971);

United States v. Burris, 418 F. 2d 677; United States v. Graham, 391 F. 2d 439,447 (C.A. Tenn. 1968).

As pointed out in the factual statement, the tapes sought to be admitted were of the 4th Division radio band (T.229) which serves the 19th Precinct in which the bank robbery occurred as well as the Central Park Precinct and the 20th Precinct in which the defendant was arrested (T.152, 134-135).

Any contention that the tapes were not admissible because they were not res gestae was destroyed by the Government's late-in-trial statement (T. 231-232)—that was never told previously to the defense(T.241-242)—that it was one of the bank tellers present at the robbery—James Rodriguez, who with teller Daniel Gonzalez followed the robber from the bank—who gave the police the description of the robber as a white man, which description was repeated over police radio. As res gestae the tapes were admissible for all purposes even that of proving that the robber was white which is what the defendant attempted to do from the witness stand and through the testimony of the FBI hair expert John Hippard. Section 803 of the Federal Rules of Evidence reads as follows:

"The following are not excluded by the hearsay rule even though the declarant is available as a witness:

- (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

The tapes were clearly admissible under the above rules.

It is additionally submitted that the tapes had to be admissible for the purposes stated herein in the factual statement (P.P. 19-20) in order for the defendant to have a fair trial. This was especially so with regard to the defense purpose of using the tapes to show that the testimony of the law enforcement people that they heard or remembered only some of the things on the tapes and not the others---each officer not hearing or recalling the same things which clearly indicates a conspiratorial pattern---when all of the things on the tapes were broadcast over the radio. Clearly the purpose of the defense for the tapes' entry into evidence was not to prove

the truth of anything said therein but to prove that the things the law enforcement people denied were said or they heard were actually broadcast in such repetitious fashion as to shatter anyone's credibility who said he didn't hear them, and were thus admissible independently of any reliance or objection based on the business entry statute or hearsay prohibition. United States v. Mejias, 552 F. 2d 435,446 (2 Cir. 1977).

The two policemen who claimed contrary to the defendant's testimony that they removed a mask from the defendant's neck also claimed they heard no description come over police radio

of the police officers who testified and the validity of the defense, and on the further additional ground that the defendant was denied a fair trial by being impeded in his effort to help show by the use of the tapes as res gestae that the robber was a white man.

Point 5

The defendant's constitutional rights of due process of law were violated by (a) the failure of the Government to be held to proving that certain evidence used against the defendant was found where stated in its pretrial discovery document given to the defense

and none that the perpetrator was white. The impeachment of their testimony regarding the absence of a description of the perpetrator may well have shattered in the jury's mind their testimony that they found a mask on the defendant's neck thus destroying before the jury an important item of evidence that the defendant's testimony that he was duped into possession of the money from the robbery was untrue and raising reasonable doubt of the defendant's guilt in the jury's mind requiring acquittal.

Wherefore the conviction must be overturned on the additional ground that the refusal to permit the police radio conversation tapes to be introduced into evidence violated the defendant's right to a fair trial under Amendments 5 and 14 by disabling the jury from properly assessing both the veracity

instead of being allowed to introduce on trial the surprise testimony of police officers that this evidence was found elsewhere; and (b) the refusal of the Court to admit for the defense the pretrial discovery document given to the defense by the Government in which the Government stated that certain evidence was found in another place than on the defendant's person when its police witnesses testified on the trial that the evidence in question was found on the defendant's person.

(A)

The purpose of broad discovery is very well described in the following excerpt taken from State v. Tune, 98 A. 2d 881,884 (13 N.J. 203):

"*** In any judicial proceeding, civil or criminal, the purpose of broad discovery is "to promote the fullest possible presentation of the facts, minimize opportunities for falsification of evidence, and eliminate the vestiges of trial by combat," 60 Yale L.J. 626 (emphasis supplied).

"Liberal procedures for discovery in preparation for trial are essential to any modern judicial system in which the search for truth in aid of justice is paramount and in which concealment and surprise are not to be tolerated" "

As pointed out at page 21 of the factual statement hereof the Government's discovery document, given to the defense in accordance with an agreement reached with defendant's counsel

in a court proceeding held on February 15, 1977 before trial judge Metzner to provide the defense with a list of the items of physical evidence in the case and information on where found*, indicated that the ski mask identified as that used in the robbery was found in the taxicab in which the defendant was riding when arrested and not on his person; and as further pointed out, the defense was subsequently surprised on the trial by the testimony of Police Officers Baumer and Calabrese that they discovered the ski mask upon the neck of the defendant. It is contended that the Government should have been held to proving that the ski mask was found where stated in its discovery document. As indicated in the factual statement the trial court in rejecting the defense contention in this regard stated simply that it did not think the defendant was prejudiced thereby(T.145-146).

(B)

When the trial court decided not to hold the Government to proving that the ski mask was found where stated in its discovery document, it should have permitted the admission in evidence of the discovery document as an admission by the Government that the ski mask was found elsewhere than where stated at the trial. As indicated in the factual statement

* See page 5 of transcript of proceedings of February 15, 1977 (Item No. 7 of Record on Appeal)

Point 6

The defendant's constitutional rights to due process of law were violated when the Court improperly charged the jury that there was evidence of flight by the defendant which it could consider against the defendant without making it clear that it was for it, the jury, to decide if the evidence indicated that it was the defendant who fled from the bank, and without describing the acts alleged to have been done by the defendant that constituted that flight.

the trial court denied an application made in this regard without giving its reasons (T.236-237). Such discovery documents are routinely supplied to defendants in criminal cases and as such the document should have been admissible either under the business entry statute, it is submitted, or as a government document (28 U.S.C. §§ 1732, 1733) United States v. Karnap, 477 F. 2d 390 (4 Cir. 1973), cert.den. 414 U.S. 867.

Wherefore the conviction must be overturned on the additional ground that the Government was not held to proving that crucial evidence used against the defendant was found where stated to the defense both orally and in its pretrial discovery document, and on the further additional ground that the document was refused admission in evidence as an admission by the Government that the ski mask was found elsewhere than its witnesses stated at the trial.

Moreover, it is submitted, flight instructions were per se improper in this case and are proper only in a case where there is direct evidence that the defendant fled, and it is then up to the jury to assess his motives for flight, because someone, it is submitted, flees from the scene of most crimes, yet it has been held that flight instructions should rarely be given. Austin v. United States, 414 F. 2d 1155.

Wherefore, it is submitted, the erroneous flight instruction here requires reversal as plain error even given that counsel did not articulate in his objection every facet of

As pointed out at page 22 of the factual statement hereof in defense counsel's objection to the Court's charge on the question of flight, the Court did not make it clear to the jurors that it was for them to decide whether it was the defendant who fled from the bank and that it was only contended by the Government that it was the defendant who fled. The charge as given by the Court gave or could easily have given the jury the impression that the Government had proved flight by the defendant from the bank.

The Court did not describe the acts alleged to have been done by the defendant that constituted that flight and the jury may well have been led to believe that the defendant's self-described efforts to carry out Max's instructions to take the money given him to a certain place constituted the flight to be considered against him in assessing its verdict.

incorrectness of the Court's flight instruction. United States v. Vereen, 429 F. 2d 713(D.C. Cir. 1970).

Point 7

The defendant's constitutional right under the Sixth Amendment to effective representation by counsel was denied by the ineffective representation by his court-assigned attorney.

In addition to the contentions of ineffective representation pointed to in the factual statement hereof at pages 24-24(a) which were contained in the defendant's pre-sentence motion to vacate the verdict of conviction on those bases (item No. 13, Record on Appeal), the defendant's assigned counsel ineffectively represented him in the following ways:

(1) The defendant's counsel, as hereinbefore stated at pages 8 and 38-39, introduced before the jury on cross-examination the highly prejudicial testimony by assistant bank manager Susan Brewer that the pants and shoes worn by the defendant when she viewed him in the police station holding cell after his arrest were the same as those worn by the bank robber*.

(2) The defendant's counsel failed to renew his objection(T.206-

* This was especially serious when it is considered that this Circuit Court had ruled in 1975 in Brathwaite v. Manson, 527 F. 2d 363, that the introduction by the government of testimony of a suggestive pretrial identification constituted reversible error.

207) to the entry in evidence of the green jacket(Government's Exhibit 17), identified by assistant bank manager Susan Brewer as just like that worn by the bank robber (T.49) and identified by FBI Agent Conway as that which he saw somewhere in the police station holding cell with the defendant(T. 204), following the defendant's unrebuted testimony that it was forced upon him in the police station(T.264-265). (3) The defendant's counsel failed to include in his objection to the entry of the green jacket the fact that no green jacket was listed in the Government's pretrial discovery document which according to the agreement made before the Court on February 15, 1977, was to list all the items of physical evidence in the case (P.5, proceedings of February 15, 1977[item No. 7 of Record on Appeal]). (4) The defendant's counsel divulged privileged attorney-client communication in stating to the Court when the defendant told him the complete story of the incident which resulted in his being on trial which should bring him censure by this Court (T.2).

In the written opinion of the court below* denying the defendant's three contentions of ineffective representation contained in the motion below, two of which were described in the factual statement hereof at pages 24-24(a), the other being abandoned, the Court stated at

* That opinion is contained in the Record on Appeal and is numbered 16 and a copy thereof is also contained in the Appendix hereof at pages 72-74.

pages 2-3 thereof (1) regarding the first contention mentioned in the factual statement, that it was a matter of counsel's trial strategy to produce or not a witness who would have testified he saw a policeman carrying the green jacket worn by the robber as they were bringing the defendant into the police station following his arrest because the testimony of such a witness might imply that the jacket was found with the defendant when he was arrested; and (2) regarding the second contention mentioned in the factual statement, that since the Court ruled out the police radio broadcast tapes and printout "there was no need for a police expert to testify how they were made". In answer to the first above-referred-to holding of the Court in its opinion, such could not have been the case because the police contentions of what was removed from the defendant's person and surrounding area were already a matter of trial record, and according to the American Bar Association Code of Professional Responsibility (EC 7-26) "A lawyer should *** present any admissible evidence his client desires to have presented". In answer to the second referred-to holding of the Court, The Court never ruled out the printout, only the tapes, and defendant's counsel never made any attempt to introduce the material contained in the printout.

Wherefore the conviction must be reversed on the additional ground that the defendant was ineffectively represented because the Government must bear the responsibility therefor as the attorney was court assigned. Powell v. Alabama, 287 U.S. 45.

Point 8

The Court abused its discretion in refusing to order the substitution of the prosecutor upon the defendant's motion made far in advance of trial with the result that the defendant was denied a fair trial in a trial marked by prosecutorial misconduct.

As already indicated more fully herein in the factual statement at pages 23-24 the defendant made a motion to substitute the prosecutor, Assistant United States Attorney T. Barry Kingham with another prosecutor for the reasons given in that factual statement, which motion was denied by the Court with the statement that it would not interfere with the administration of the U.S. Attorney's Office to tell them that another prosecutor should be assigned to try this case. The defendant's motion was made on February 15, 1977, the first time Mr. Kingham appeared in this case, and the Court's ruling which was made even though Mr. Kingham offered to step down but expressed the hope that the Court would allow him to continue on the case, was an abuse of discretion in view of what the defendant recounted to the Court about his experience with Mr. Kingham in a prior trial in which he won an acquittal. The ruling resulted in the defendant being denied a fair trial by the trial being marked by the use of surprise evidence that differed substantially from that which the Government stated in its every document would be offered, signs of a coord-

inated pattern of perjury by the law enforcement people who testified to which reference has already been made in Point 4 and in the factual statement, and, further, by some indication in the record of signaling of the witnesses by the prosecutor to tell them what to testify to as will be shown.

During the testimony of Police Officer Calabrese the defendant spotted signs that the witness ~~was~~ responding to signals being given by the prosecutor and brought this to the attention of the Court(T. 166-167). The record indicates that the defendant said: "Everytime the witness was asked a question by counsel that he was asked before on direct examination he would look over at Mr. Kingham and Mr. Kingham would move the pencil only at those times"., which statement the defendant cannot account for because what defendant actually said was to the effect that everytime the witness was asked a question by counsel that he was not asked before on direct examination he would look at Mr. Kingham and Mr. Kingham would move the pencil only at those times. Just prior to the defendant's complaint to the Court about the signal-giving, the following line of questioning of the witness was pursued by the defendant's counsel(T.165-166):

"Q. Did you have a discussion about your testimony with Mr. Kingham before you testified today?

A. A discussion? No, sir.

Q. Did you meet with him?

A. I met with him, yes.

Q. Didn't you talk about this case?

A. No, sir. Just what time it would start.

Q. Mr. Kingham didn't ask you anything about what your role in all this was?

A. No, sir.

Q. Weren't some other officers present along with you and Mr. Kingham?

A. Yes sir.

Q. Didn't you all talk about what had gone on and what part you each played?

A. Well, just as to what I remember about what I took from the defendant.

Q. That was all you talked about?

A. Yes, sir.

Q. Did the other officers talk about what they had done?

A. Just what parts they had taken.

Q. Did Mr. Kingham talk about his theory of the case and a number of other items?

MR. KINGHAM: I object your Honor.

THE COURT: Sustained".

It was at the point which coincided with the change in the witness' testimony that the defendant noted the reappearance of suspicious pencil movements that he had seen Mr. Kingham employ with other witnesses when they looked at him that convinced the defendant that Mr Kingham was giving signals

to the witness.

A scrutiny of the subsequent testimony of FBI Agent Conway gives signs of signal use with him also. He testified in part as follows regarding when he went out to assist in the apprehension Of the robber(T,215):

"Q. When you went out did you have a description of who you were looking for?

A. We had a relatively good description.

Q. What was that description?

MR KINGHAM: Objection, your Honor.

THE COURT: He can tell who he was looking for.

A. The knowledge I had of it was that the perpetrator had a weapon, a ski mask and a jacket".

That is hardly a good description by anybody's standard. It is submitted that a signal came to him in some fashion to limit his testimony. He would not even admit that there was a description of the car although he had previously testified that the FBI bank robbery coordinator who monitors the police band gives them an exact description of everything happening (T. 213-214). Agent Conway also testified that he had been an agent for 6 $\frac{1}{2}$ years yet neither he nor apparently the other agent or agents with him in the car going to assist in the chase of the robber being conducted by the police knew whether the car in which they were riding was equipped with a scanner—some are and some are not, he testified—(T.214) that would enable them to pick up police transmissions about the

chase more rapidly than if they are relayed from the bank robbery monitor. Again it is submitted that Agent Conway was signaled not to divulge what was on police radio.

Wherefore the conviction must be reversed on the additional ground that the Court abused its discretion in refusing to order the substitution of the prosecutor on the defendant's motion made far in advance of trial with the result that the defendant was denied a fair trial in a trial marked by prosecutorial misconduct.

Point 9

- A. The Court intervened prejudicially to the defendant in counsel's cross-examination of Police Officer Calabrese and placed its own incorrect interpretation on an admission made by the witness favorable to the defense, which intervention broke the rhythm and effectiveness of counsel's cross-examination, assisted the witness to retreat from the admission and reverse himself and thus enabled the witness to regain his composure and fortify himself to continue to lie if in fact that is what he was doing and the admission favorable to the defense was but a letdown of his guard, and in this way the defendant was denied a fair trial.
- B. The Court failed to hold an inquiry to attempt to determine if the defendant's contention that the

prosecutor was giving signals to the witness was true or not and thus denied the defendant a fair trial.

(A)

The Court intervened in counsel's cross-examination of Police Officer Calabrese as follows(T., 162-163):

"Q. You heard on the radio that the perpetrator they were looking for was a male white armed with an automatic in a car of some sort, is that right?

A. Yes, sir. We heard he was in a car.

THE COURT: Wait you have only said yes to part of his question.

THE WITNESS: Yes. I can't recall if it was a male white, black. It just said he was in a car."

The witness knew what was asked by counsel and what he had answered to because there was no repeat of the question. The Court's interruption was inappropriate here in this most crucial point and its construction of the witness' answer was not correct, for the witness answered all parts of the question as put. The Court's interruption broke counsel's cross-examination rhythm and enabled the witness to pull himself together if he was beginning to break and made truth finding more difficult if there was hidden truth

to be found.

(B)

As pointed out in Point 8 hereof at pages 56-57, the defendant contended at trial during the testimony of Police Officer Calabrese that the prosecutor was giving signals to the witness. The Court instead of inquiring into the facts of the matter stated that it would have seen any signals given by the prosecutor and ended the matter on that note.

Wherefore the conviction must be reversed on the additional ground that the Court's inappropriate interference with counsel's cross-examination of the witness on one of the most crucial aspects of the case deprived the defendant of a fair trial in accordance with due process of law and on the further additional ground that due process of law was denied when the Court failed to inquire into the facts of the defendant's contention of signal giving by the prosecutor.

CONCLUSION

Wherefore the conviction of the defendant-appellant must be reversed upon the grounds that the "stop and frisk" and arrest and subsequent use at the defendant-appellant's trial of evidence secured as a result of that arrest violated the defendant's rights under the Fourth Amendment of the Constitution, and the conviction must be reversed for the further reasons stated in each and every one of the other points contained in this brief.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

United States of America

v.

Alfred Lewis,

Defendant-Appellant.

Docket No. 77-1330

AFFIDAVIT OF FILING AND
SERVICE

DEC 16 1977

This is to verify that today I filed with the Court of Appeals by mail the accompanying four copies of the appellant's brief in the above entitled action and served by mail on the respondent-appellee one copy of the accompanying appellant's brief by placing same before 12:01 o'clock p.m. in both cases in the hands of the undersigned Atlanta Penitentiary caseworker for immediate mailing in envelopes addressed respectively as follows:

Clerk's Office--United States Court of Appeals
Second Circuit, U.S. Court House , Foley Square,
New York, N.Y. 10007

United States Attorney's Office
Southern District of New York
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New York, N.Y. 10007

Sworn to before me this 13
day of December, 1977

[Signature]
Notary Public

YS/ BERKELEY STROBEL
SENIOR CASE MANAGER

13 DEC 1977

Parole Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

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